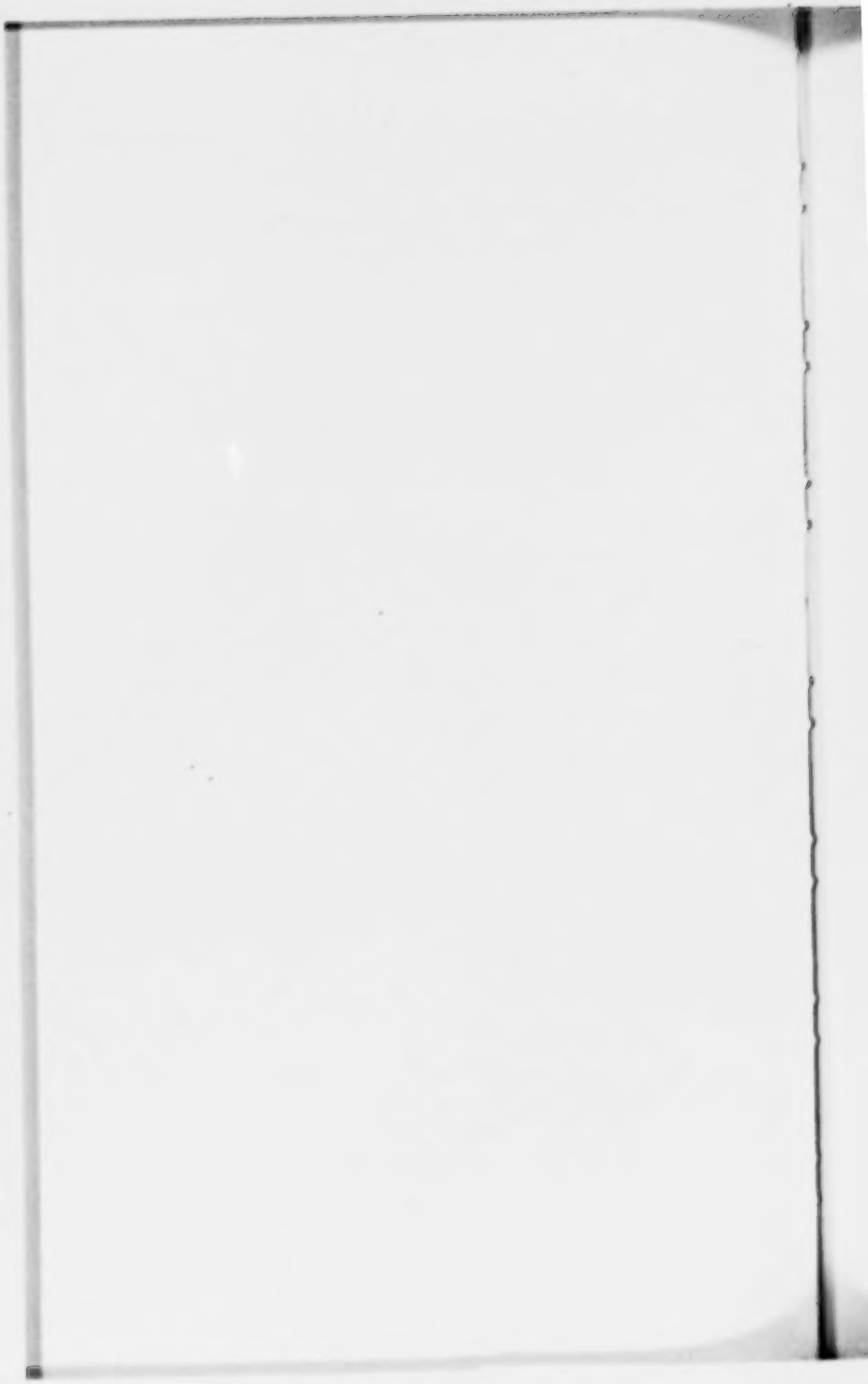

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In The

reme Court of the United States

October Term, 1972

No. 72-549

SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, ET AL.,

Petitioners,

v.

TATE BOARD OF EDUCATION OF THE OMMONWEALTH OF VIRGINIA, ET AL.,

Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES OURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING OR REMAND

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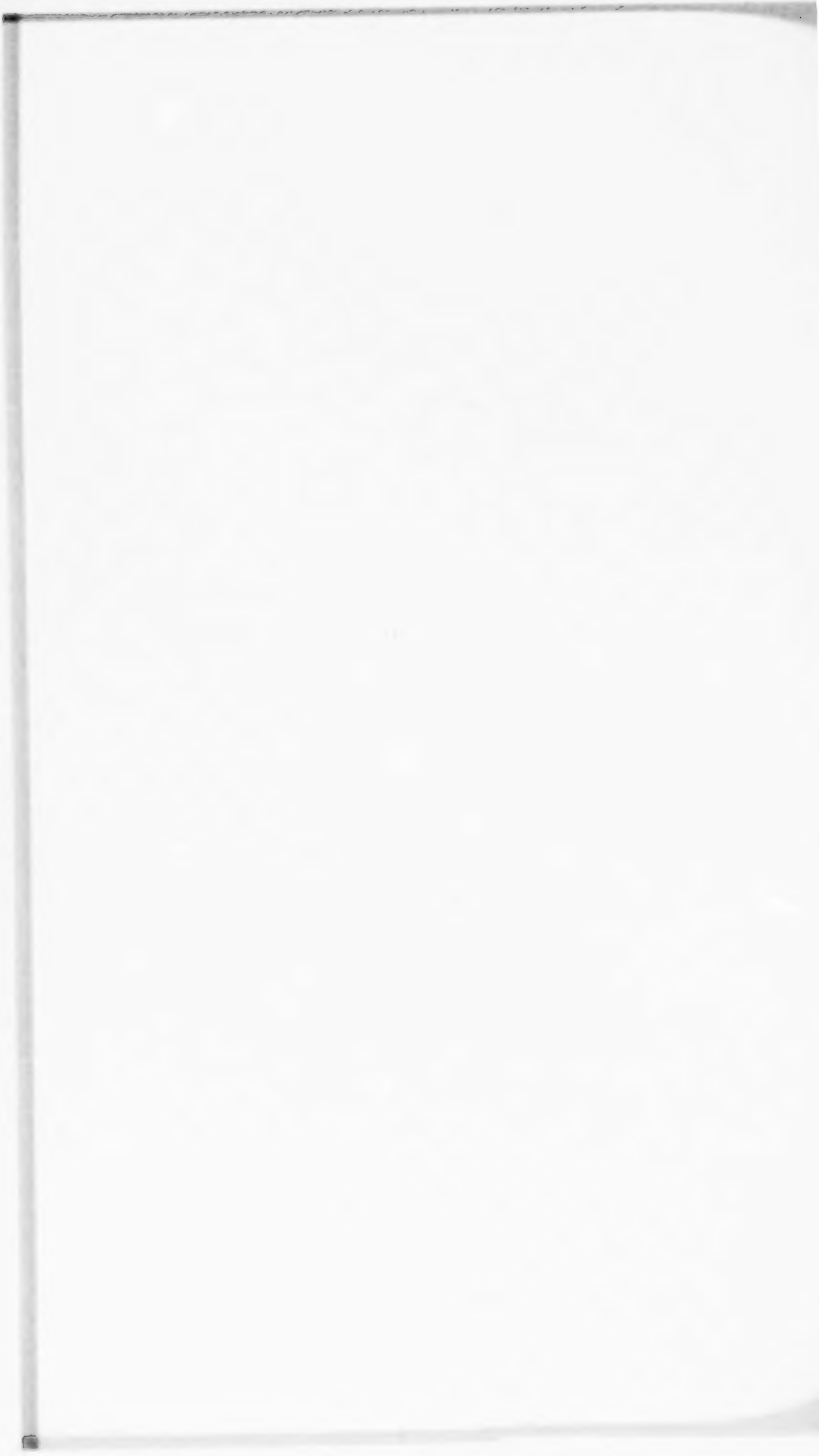

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In The

Supreme Court of the United States

October Term, 1972

No. 72-549

SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, ET AL.,
Petitioners,

v.

STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING OR REMAND

The Petitioners, the School Board of the City of Richmond, and the individual members thereof respectfully pray that the Court grant a rehearing in this cause or, in the alternative, modify its per curiam order of May 21, 1973, by directing that the case be remanded for consideration of certain critical issues presented by the record herein which have not previously been resolved by either the Court of Appeals or the District Court below.

This petition is timely filed in accordance with an order signed by Mr. Chief Justice Burger on June 18, 1973, extending the time for its filing to and including July 16, 1973.

INTRODUCTION

The reasons advanced in this request for a rehearing or, alternatively, for a remand, must be viewed in light of two factors: (1) the enormity of the effect of the affirmance by an equally divided Court; and (2) the resulting inexplicable inconsistencies which now envelop school desegregation guidelines. The Petitioners respectfully submit that these two considerations override the significant interest normally present in protecting the finality of this Court's actions particularly, where as here, only the procedural process of direct review has been concluded and no final adjudication on the merits of the issues presented has been made. *Neil* v. *Biggers*, ... U.S. ....., 93 S.Ct. 375, 378-79 (1972); *United States ex rel. Radich* v. *Criminal Ct. of City of New York*, 459 F.2d 745, 750-51 (2d Cir. 1972), *cert. denied*, ... U.S. ....., 93 S.Ct. 893 (1973).

A.

The Practical And Realistic Effect Of The 4-4 Affirmance

The Richmond School Board cannot accept any characterization of this Court's action as its first calculated retreat in almost twenty years from the consistent and diligent protection of black school children from the forces and effects of pervasive and invidious discrimination. Nor can the School Board believe that this Court's action represented a conscious reversal of the unanimous view of a total of 16 Supreme Court Justices both as to the inherent inequality of all-black schools[1] and as to the constitutional imperative

[1] Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

hat both the existence and vestiges of such schools be liminated to the extent feasible.[2] Indeed, the rationale xpressed by this Court in its most recent opinion dealing ith school desegregation, *Keyes* v. *School District No. 1,* .... U.S. ....., 41 U.S.L.W. 5002 (June 21, 1973), indicates hat this faith is well founded.

Yet, even assuming as we must that other considerations d to the equal division in this Court, the practical and ndeed calamitous effect thereof is readily apparent to all. As ound by the District Court and unquestioned by the Court f Appeals, the present desegregation plan in Richmond ntained the seeds of its own frustration—a hastening of return to substantially all-black schools surrounded by eadily perceived white schools.[3] The Court of Appeals was f the view that the District Court's concern for effective elief led it to reversible error, and although acknowledging hat the evidence seemed to indicate the workability of the lan in practice,[4] accordingly set aside the relief decreed hich may reasonably be construed as having been intended preclude a return to the racially separate schools which his Court sought to eradicate with its decision in *Brown I.* But so much more is at stake than the equal educational pportunity for now and hereafter of black children in *ichmond.* The immeasurable impact on the substantial ajority of all black children in this nation is all too pre-ictable. Though blacks constitute but approximately 15 er cent of the total public school composition within this

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[2] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, -26 (1971).

[3] Bradley v. School Bd. of City of Richmond, 338 F. Supp. 67, 3-04 (E.D. Va. 1972).

[4] Bradley v. School Bd. of City of Richmond, 462 F.2d 1058, 1061, 64 (4th Cir. 1972).

country,[5] nearly 75 per cent of the black children live in metropolitan areas.[6] Save in fortuitous areas such as Charlotte-Mecklenburg County, North Carolina, where the predominantly black and poorer core city is part of a metropolitan school system encompassing the more affluent and substantially white suburbs, city black children will be locked into all-black school systems for the foreseeable future—an incomprehensible departure from the most elementary concepts of equal justice under law.

Surely our most rudimentary concepts of fair play and democratic ideals which underlay the decisions in *Brown I* and *II*[7] and the historic role of the judiciary in the vindication of constitutional deprivations compel the formulation of desegregation guidelines precluding the inevitable consequence of the present state of the law—the accomplishment of virtually complete segregation within most urban public school systems through the establishment of black schools in core-city areas. This likely eventuality no doubt has provided the impetus for the actions of district courts which in confronting this reality have construed previous remedial guidelines as clearly indicating that such a disastrous and unnecessary polarization of school children was constitutionally infirm.[8]

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[5] Bureau of Census, Department of Commerce, *General Social and Economic Characteristics PC(1)-A1, United States Summary* Table 74, p. 367 (Washington, D. C.: Government Printing Office, 1971).

[6] Bureau of Census, Department of Commerce, *General Population Characteristics PC(1)-B1, United States Summary* Table 67, pp. 324-33 (Washington, D. C.: Government Printing Office, 1971).

[7] Brown I, 347 U.S. at 495; Brown v. Board of Educ. (II), 349 U.S. 294, 298 (1955).

[8] Bradley, 338 F.Supp. 67; Bradley v. Milliken, No. 35257 (E.D. Mich. S.D., Mar. 28, 1972), *aff'd*, Nos. 72-1809, -1814 (6th Cir., June 12, 1973) slip opinion at 63-64, 80; *cf.* United States v. Board of School Comm'rs., 332 F.Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir. 1973).

B.

The Inconsistencies Now Enveloping School Desegregation Guidelines

As a result of this Court's per curiam affirmance of the Court of Appeals, city school boards committed to desegregation are confronted with a tragic dilemma in that previous experience flowing from the full utilization of established remedial directives[9] coupled with the crippling limitations on the power of district courts implicit in the 4-4 affirmance of the Court of Appeals foretells the retention of or return to all-black schools in those areas contiguous to readily accessible havens for whites. Even a cursory application of existing guidelines to the realities established by this record demonstrates the presence and scope of the irreconcilable inconsistencies with which district courts and school authorities must grapple pending further guidance from this Court.

The biracial Richmond School Board remains unanimous in its agreement with this Court's longstanding determination as to the inherent inequality of all-black schools in a biracial community,[10] its repeated assertions that the objective in all school desegregation cases is the elimination root and branch of all vestiges of a system of separate schools[11] and its placement of an affirmative obligation on all school authorities to take whatever steps are necessary to achieve the greatest possible degree of actual desegregation.[12] The Board similarly endorses the principle firmly established in

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[9] *E.g.*, Swann, *supra*; Green v. County School Bd., 391 U.S. 430 (1968).

[10] Brown I, *supra*.

[11] *E.g.*, Swann, 402 U.S. at 15; Green, 391 U.S. at 438-39.

[12] Swann, 402 U.S. at 26; Davis v. Board of School Comm'rs., 402 U.S. 33, 37 (1971).

Green, 391 U.S. at 439-40, that ineffective freedom-of-choice plans are not constitutionally viable and has accepted the uniformly applied standard that the fear of white flight or resegregation cannot be interposed as a justification for less effective plans of desegregation.[12] Its members have likewise accepted the indisputable reality that segregated housing patterns dictate the use of pupil transportation which is not only a reasonable but an essential tool of desegregation. Nor do they dispute the historical wisdom inherent in this Court's delineation of the remedial powers of district courts as requiring full consideration of *all* options and alternatives in the achievement of effective desegregation, and to the extent feasible, the prevention of the reoccurrence of the very segregation sought to be eliminated.[14]

All of these unequivocal pronouncements by this and other courts have been shrouded in the admonitions that "effectiveness" is the key—that the invidious effects of segregation must cease to exist in an *objective* sense—and that this Court is interested not in semantics or technicalities but in substantive realities.[15]

In light of this Court's per curiam opinion affirming the decision of the Court of Appeals, however, a moment's reflection reveals the staggering confusion which now abounds in the hearts and minds of those who have adhered to these tenets and have persevered in their application. Guidelines for urban school desegregation are now encumbered by the following irreconcilable inconsistencies the magnitude of

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[12] *E.g.*, Monroe v. Board of Comm'rs., 391 U.S. 450, 459 (1968).

[14] *E.g.*, Green, 391 U.S. at 438 n. 4, 439.

[15] Davis, 402 U.S. at 37; Wright v. Council of City of Emporia, ___ U.S. ___, 92 S.Ct. 2196, 2203 (1972); *Id.* 92 S.Ct. at 2208 (dissenting opinion), *citing* Green, *supra*; Swann, 402 U.S. at 31.

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which, we respectfully submit, compels early and effective resolution:

1. How does one equate the repeated admonitions that school authorities and district courts have the duty to select the alternative holding the greatest promise of effectively removing all vestiges of a system of dual schools in the context of the substantive realities before the court *with* the seeming disregard of extensive findings that the children of Richmond, Henrico and Chesterfield live in one community and that the city-only plan has served only to create readily perceived black schools in the City and white schools in the Counties? Prior to the 4-4 affirmance of this case, it was reasonable to assume that the only limitation on this required judicial appraisal was the availability of alternatives found to be feasible, reasonable and educationally sound. In view of the implicit rejection of such alternatives in this case, however, district courts and school authorities can only speculate as to what other, if any, limitations might be forthcoming and, indeed, even as to the ultimate objective ought to be attained in a city-only plan of desegregation.

2. The traditional principle that equity decrees should be designed to preclude the reoccurrence of the evils sought to be eradicated cannot be squared with the plethora of evidence and findings that the continued operation of the Richmond schools under a city-only plan is an exercise in futility in the face of obviously more effective alternatives.

3. The rejection by this Court of the relevancy of the "dominant purpose" test in cases involving the alteration of school system boundaries, *Wright* v. *Council of City of Emporia*, ... U.S. ....., 92 S.Ct. 2196, 2203 (1972), is difficult to reconcile with its affirmance of a decision embodying

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the identical standard in determining the sanctity of existing school division lines.

4. The affirmance of a decision embracing a "dominant purpose" standard in adjudging the validity of either the establishment or *maintenance* of school division lines would appear to ignore the explicit and well supported findings by the District Court that the continued maintenance of such lines was in part racially motivated (*e.g.*, 338 F. Supp. at 100-01). The question remains unanswered as to why on this record the requested relief is not supportable even under this overly restrictive test espoused by the Court of Appeals.

5. The justification for the implicit sanctification of existing school division lines is difficult to perceive in view of irrefutable proof of the involuntary assignment and transportation of thousands of black students across existing school division lines for the sole purpose of perpetuating segregation for almost two decades after *Brown I*. Equally puzzling is the rejection of a method utilized to defy this court as an acceptable means of creating "just schools" in the Richmond community.

6. Though fully subscribing to the recognition in *Swann*, 402 U.S. at 29-31, of the practical necessity of extensive transportation as affording the only means of providing an effective remedy in the context of Charlotte-Mecklenburg, one can not but question the soundness of its utilization in the Richmond context where at best it has served to create only momentary biracial schools at the price of greatly accelerating, self-defeating resegregation. In view of the fact that many of the students involved here live closer to schools in adjoining school divisions than to those they are presently attending, equally perplexing is the rejection of the transportation of pupils across existing school division

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lines where the record clearly demonstrates that a greater degree of actual desegregation can be attained even if such transportation were limited to a prescribed time or distance.

7. The duty of school authorities and district courts to consider *all* options and alternatives judicially determined to be feasible has been greatly limited by the implicit rejection of legislatively conceived plans for merger of or contractual interchange of pupils between existing school divisions as appropriate remedial devices, as well as by the apparent irrelevancy of findings clearly establishing both state encouragement and extensive current utilization by the three school systems involved of contractual pupil exchanges for all educational purposes save desegregation.

8. The affirmative duty of school authorities to take whatever steps might be necessary to remove all vestiges of state imposed segregation to the extent feasible and to promote the greatest degree of actual desegregation has been substantially eviscerated by the severe limitations which now effectively preclude a district court from utilizing its discretionary powers to order school authorities to exercise powers presently possessed under state law.

The national importance of the issues, we respectfully submit, requires a definitive resolution of these dichotomies at the earliest practicable date. Fortunately, even at this stage of litigation the judicial process affords avenues to eliminate or minimize the effects of such a quandary—further utilization of the full measure of the deliberative process of this Court in the hope of producing substantive finality as to the issues which presently divide it, or if this impasse cannot be resolved, a remand either for further consideration of critical issues left undecided or for lower court factual determinations which could assist this Court in providing the needed direction.

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As specific grounds for the petition for rehearing or remand, the School Board shows as follows:

I.

A Rehearing Should Be Granted In View Of A Conflicting Appellate Decision Which May Be Expected To Produce The Definitive Resolution Lacking In This Case.

A case involving legal issues substantially similar with those left unanswered by this Court's equal division, concerning the schools in the Detroit, Michigan metropolitan area, was decided by the full United States Court of Appeals for the Sixth Circuit on June 12, 1973. *Bradley* v. *Milliken*, Nos. 72-1809, -1814 (6th Cir.). Though the two cases are in some respects distinguishable both factually and from the standpoint of present legal posture, the divergence of rationale employed by the two Courts of Appeals in defining the scope of remedial powers of district courts fashioning relief in overwhelmingly black city school systems is unmistakably demonstrated by the following quotations from the Sixth Circuit's opinion:

> Like the District Judge, we see no validity to an argument which asserts that the constitutional right to equality before the law is hemmed in by the boundaries of a school district.
>
> * * *
>
> . . . [T]he record establishes that the State has committed de jure acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little doubt that a federal court has both the power and the duty to effect a feasible desegregation plan. Indeed such is the essence of *Brown II*. . . . In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby

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school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines. [citations omitted.]

There exists, however, an even more compelling basis for the District Court's crossing artificial boundary lines to cure the State's constitutional violations. The instant case calls up haunting memories of the now long overruled and discredited "separate but equal doctrine" of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). If we hold that school district boundaries are absolute barriers to a Detroit school desegregation plan, we would be opening a way to nullify *Brown* [I] which overruled *Plessy*, *supra*.

This court in considering this record finds it impossible to declare "clearly erroneous" the District Judge's conclusion that any Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools, surrounded by a ring of suburbs and suburban school districts overwhelmingly white in composition in a State in which the racial composition is 87 per cent white and 13 per cent black.

. . . Under this record a remedial order of a court of equity which left the Detroit school system overwhelmingly black (for the foreseeable future) surrounded by suburban school systems overwhelmingly white cannot correct the constitutional violations herein found.

Bradley v. *Milliken*, *supra*, slip opinion at 56, 63-64.

Owing to this patent conflict between the Circuits, wisdom would seem to dictate that the matter be finally resolved in the broader context which would be afforded by this Court's simultaneous review of both cases. Further-

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more, a conclusive adjudication on the merits of these issues is even the more likely in view of the probable participation in *Bradley* v. *Milliken* of the one Justice who took no part in this case.

Thus, the realistic expectancy of a substantive ruling by this Court militates strongly in favor of granting this petition or, at the very least, holding it in abeyance pending the ultimate resolution of the issues as presented in *Bradley* v. *Milliken*. The latter procedure was utilized by this Court in *Forgett* v. *United States*, 383 U.S. 926 (1966), 390 U.S. 203 (1968), where a petition for rehearing was held for nearly two years pending the outcome of closely related cases which were before it on the merits.

II.

A Rehearing Would Be The Appropriate Means Of Affording This Court Adequate Time To Conclusively Resolve Questions Of Immense Significance.

This case was heard very late in the Term (April 23, 1973) and was within four cases of being last on the Court's calendar. The relative dispatch within which this Court's per curiam affirmance was rendered and indeed, the lack of any formal opinion owing to the equal division among the Justices, indicates little occasion for the customary detailed study and circulation of opinions.

The foregoing circumstances are not without significance. There may well have been a greater chance of securing a majority—and thus the urgently needed guidance—had the Court had more time for deliberation. As Mr. Justice Frankfurter remarked in dissenting from a denial of rehearing in *Burns* v. *Wilson*, 346 U.S. 844 (1953) (dissenting opinion), "[o]ne has a right to assume that there is greater likelihood of securing agreement of views for a Court opinion at the beginning than at the end of a term."

Id. Mr. Justice Jackson has remarked that "not infrequently the detailed study required to write an opinion, or the persuasiveness of an opinion or dissent, will lead to a change of a vote or even to a change of result." R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 15; *see generally* A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957). Finally, in *Reid* v. *Covert,* 354 U.S. 1 (1957) (concurring opinion), Mr. Justice Harlan explained how the grant of a petition for rehearing had afforded an opportunity for a greater degree of reflection upon difficult issues involved than had been possible in the short interval between the argument and decision at the closing days of the previous Term. *Id.* at 65.

We respectfully submit that the reasoning of Justices Frankfurter, Jackson and Harlan is particularly applicable here in view of the relatively brief period of time within which this Court was asked to finally resolve issues of the utmost gravity relating to the future course of school desegregation in many of this nation's urban areas.

III.

In The Event The Equal Division Among The Justices Of This Court Remains Immutable, The Most Appropriate Disposition Would Be A Remand For A Consideration Of Critical Issues Left Undecided Or For Findings Which Could Facilitate A Conclusive Ruling On The Merits.

A number of important questions presented by the record in this case were left undecided by both the District Court and Court of Appeals below. Additionally, as discussed at pp. 5-9 *supra,* the equal division among the Justices of this Court raises crucial inconsistencies in the remedial guidelines for urban school desegregation. Hence, even if the division on this Court is incapable of resolution on the pres-

ent record, we respectfully submit that the case should be remanded for a detailed exploration of remedial possibilities less extensive than the sole device (consolidation of separate school districts) considered by the District Court and the Court of Appeals or for any additional matters which in the view of certain Justices might need clarification.

1. Although the methods of relief requested in the District Court included a contractual exchange of students between the three *existing* school divisions operated as separate entities (A. 107-08), that Court selected the technique embodying school division consolidation as proposed in the plan submitted by the School Board (338 F.Supp. at 244-48) and did not address itself to contractual interchange as a workable option or alternative. Accordingly, the Court of Appeals rejected only the proposed consolidation without considering the feasibility of the suggested contractual interchange[16] or any other remedial possibilities.

The School Board respectfully submits that the propriety of this alternative form of student assignment is thus still unsettled, and that this record demonstrates both its historic use to perpetuate segregation (338 F.Supp. at 83-84, 141-46, 159-61) and its current use by Richmond, Henrico and Chesterfield for valid educational purposes (A. 417-20). During 1970-71, for instance, more than 20,000 Richmond and Chesterfield students as well as 10,000 Henrico students attended the jointly operated Math-Science Center located in Henrico County (A. 419-20). Similarly day-to-day contractual interchanges occurred during the school year just ended at this facility as well as at a number of other special

[16] The Court of Appeals held only that the District Court had erroneously compelled the Commonwealth of Virginia *"to restructure its internal government"* for purposes of achieving racial balance in the public schools. 462 F.2d at 1060 (emphasis added).

purpose schools serving the three areas. This particular technique is fully authorized under the laws of Virginia,[17] and even the Respondents herein have referred to it as the preferred alternative (A. 1346-48).

Indeed, even if a remedy providing for contractual interchange were limited to plans requiring no increase in the present levels of transportation of the students affected, such a plan would result in a significantly greater degree of actual desegregation in view of the proximity of many of the black city and white county schools to the existing school division lines. At the very least, there should be a rational answer to the perplexing question as to why contractual interchanges are permissible and indeed encouraged for all valid educational purposes save desegregation.

Nor is the appropriate remedial device limited to a choice between the consolidation of school divisions or a planned contractual interchange of pupils between the separate systems. For instance, permitting majority to minority transfers from one division to another or requiring joint selection of sites and operation of *new* schools to ameliorate that degree of segregation and isolation which at present is inevitable are but two of many possible remedial approaches which warrant detailed scrutiny.

The orderly administration of justice dictates a strong preference for the exhaustion of all possible remedial devices in an effort to obtain a substantive decision on the present

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[17] *See, e.g.*, 5 Va. Code Ann., § 22-219 (Repl. Vol. 1973) (empowering school boards to make regulations for the admission of and tuition arrangements for pupils resident in other political subdivisions pursuant to contracts between the separate entities); 5 Va. Code Ann., § 22-99 (Repl. Vol. 1973) (authorizing contracts between separate political subdivisions for the furnishing of school facilities); 5 Va. Code Ann., § 22-7 (Repl. Vol. 1973) (authorizing the operation of joint schools by separate political subdivisions).

record rather than requiring the needless, time-consuming and costly development of a new one.[18]

2. If some of the Justices of this Court remain unpersuaded as to the lack of effectiveness of the plan of desegregation under which the Richmond schools are currently operating, then this case should be remanded with instructions that its evaluation in practice be continued. Such a practical assessment, in fact, remains an affirmative requirement unless this Court's explicit language in *Green*, 391 U.S. at 439, is to be ignored. It is submitted that clarification as to the nature of the District Court's jurisdiction in this case would be of particular assistance in alleviating at least some of the uncertainties presently prevailing.

3. This Court has clearly rejected the relevancy of any inquiry concerning purpose or motivation where an alteration of school boundaries has the *effect* of impeding the process of desegregation, *Emporia*, ... U.S. ....., 92 S.Ct. at 2203; therefore the basic question remains as to whether the same standard should be utilized in determining if a state may insist upon the continued maintenance of school boundaries where the effect likewise deters complete and effective school desegregation. The Court of Appeals, without the benefit of this Court's action in *Emporia*, relied on what may well have been an irrelevant or incorrect legal standard in reversing the District Court's decree (462 F.2d at 1064). Thus at the very least the case should be remanded to the Appeals Court with directions that it re-examine its holding in light of *Emporia*. A finding by that Court that the effect-oriented standard is controlling here could well lead to a different result. Alternatively, if the Court of

[18] This Court has on past occasions remanded cases for the resolution of issues left undecided by its prior orders. *See, e.g.*, Parks v. Simpson Timber Co., 389 U.S. 909 (1967); Union Trust Co. v. Eastern Air Lines, 350 U.S. 962 (1956).

peals should determine that it must adhere to "dominant rpose," then it should be instructed to consider the Dis-ct Court's findings regarding the racial motivation under-ng the continued maintenance of the school boundaries *g.*, 338 F.Supp. at 100-01). Through such a process, not ly might the present stalemate be eliminated, but also a eater degree of clarity produced as to the standards which e to be controlling in the vital area involving the future rse of urban school desegregation.

4. Finally, and perhaps most importantly, the case should remanded for a determination as to the continued vitality this Court's directives in *Green* and *Swann* as they per-n to a city school system which has been severely frus-ted in attempting to realize the objective sought to be ained.

While the School Board has endorsed and steadfastly nered to the directives expressed in *Green* and *Swann*, record herein graphically demonstrates the actuality of racial polarization which is occurring among the school stems in the Richmond metropolitan area. The Board has lized all tools to the maximum extent possible to insure greatest possible degree of actual desegregation within City school system; however, even though the Board nains committed to the principles of a fully desegregated ucation for its students, must it persist in utilizing de-es which are serving only to promote resegregation within City's boundaries? Such a requirement would appear to totally inconsistent with the familiar principle that equity l not compel the doing of a vain act. By continuing to rate the City school system under the type of desegre-ion plan required by *Green* and *Swann*, the Richmond nool Board is severely dismayed that, in the context of metropolitan area, it may well be hastening a return to same racial separation which flourished from the time

of *Brown I* to the time of the filing of the Motion for Further Relief in March, 1970.

This enigma is all the more baffling in light of the fact that in its present posture this case has the unique and dubious distinction of illustrating the rejection of an obviously more effective remedy found by a district court to have been a feasible method of assuring the vindication of a deliberately perpetuated denial of constitutional rights.

These circumstances, we respectfully submit, compel a remand for a determination as to whether the guidelines established by this Court should be modified to conform to the realities of the Richmond situation.

CONCLUSION

For the reasons and grounds set forth above, the Petitioners respectfully pray that this Court grant the petition for rehearing and either set the case down for reargument or hold it in abeyance until such time as conflicting decisions are finally and conclusively resolved. In the alternative, if the petition for rehearing be denied, it is respectfully requested that this Court modify its previous order by remanding the case to permit the resolution of the critical and perplexing issues set forth above.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the Petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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